No. 6112

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY (a corporation organized and existing under and by virtue of the laws of the State of West Virginia),
Appellant,

vs.

FREDA DALY, as administratrix of the estate of Stewart Daly, deceased,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

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STATEMENT OF THE CASE.

This action was brought by the administratrix of the estate of Stewart Daly, deceased, to recover for his death. The complaint (R. 2) alleges in substance: On August 1, 1928, the defendant contracted with the York Ice Machine Company for a new ice machine and for the removal of an old ice machine from the packing plant of the defendant. The York Ice Machine Company in turn sold the old ice machine to David Mottleson, who agreed to remove it. The only way the old machine could be removed was by a freight elevator. Though the York Ice Machine Company and David Mottleson were independent contractors, yet in the removal of the old ice machine

they were furthering solely the designs and desires of the defendant. The elevator was one of unusual design and due care required that one experienced in operating it should operate it when in use. The elevator started with a jump and jerk, and could not be brought to a stop unless the rope were pulled far enough. The defendant negligently failed to warn Mottleson and negligently failed to put any trained man in control while the old ice machine was being removed. The work of removing the old ice machine was inherently and intrinsically dangerous, even if extraordinary care were used, it being the duty of the defendant to use due care for the safety of all invitees into its premises. On August 20th Stewart Daly, without the knowledge of his parents or of the work, was employed as a casual servant of David Mottleson helping remove the old ice machine up the elevator.

Paragraph IX (R. 7) of the complaint alleges: "That continuously eight hours each day or thereabouts from Monday, the 20th day of August, 1928, until Friday, the 24th day of August, 1928, Swift & Company, being engaged in business in Montana, knowingly and negligently and wrongfully and unlawfully permitted to be employed and to render and perform services and labor in, on, and about a certain freight elevator in its plant at 724 South Arizona Street in Butte, Silver Bow County, Montana, Stewart Daly, a child under the age of 16 years, to-wit, of the age of 11 years 8 months and 22 days, and the said elevator being in operation constantly during such time, and such employment and service and labor of the said child, Stewart Daly, being at all times, until

after he was injured, unknown to Philip Daly the father of the said child and unknown to the mother this administratrix, and such conduct of Swift & Company was a proximate and efficient and direct cause of the injury to Stewart Daly, hereinafter set out, and the elevator in motion overturned on Stewart Daly the half fly-wheel and so injured him that he died after lingering about three days."

On August 24, 1928, in the course of the work the half fly-wheel weighing about 1350 pounds was being loaded on the elevator, and was resting ends up on its circumference projecting over the elevator shaft. Stewart Daly was helping steady the fly-wheel, and while Mottleson, unskilled in the operation of the elevator, was attempting to bring the elevator to the level of the floor, the elevator started with a jerk from some distance below the floor and struck the fly-wheel which was projecting into the shaft and turned it over on the foot of Stewart Daly and crushed the same. Stewart Daly received reasonable and skillful surgical attention, but due to such injury infection set in and he died three days later.

The defendant demurred (R. 11) general and special, to the complaint, which demurrer was overruled. The defendant answered (R. 14) admitting and denying the allegations of the complaint, and alleged affirmatively: That Stewart Daly was employed by Mottleson and took orders from Mottleson only, and worked under and with Mottleson, and they were engaged in the same work, that of removing the old ice machine, which was owned by Mottleson; that in the course of their work they placed a portion of

the fly-wheel so that it projected into the elevator shaft, so that it could be struck by the elevator, and that Mottleson without authority of the defendant operated the elevator so that it did strike the fly-wheel and overturn it upon Stewart Daly. The plaintiff replied to the answer (R. 17), admitting nearly all of the affirmative defense.

The plaintiff abandoned all allegations of negligence except that alleged in paragraph IX, which is based upon section 3095 of the Montana Codes of 1921, and the evidence relates solely to those allegations. We will try to briefly summarize the evidence of the plaintiff on this point.

David Mottleson (R. 30) shows in substance the following: He purchased the old ice machine from the York Ice Machine Company for $15.00 and agreed to remove it from the basement of the defendant's plant, where he bought it. He had no conversation with the manager of the defendant relative to the removal of the ice machine. He had Oscar Hedman and the boy Stewart Daly helping him, Daly carrying tools. The fly-wheel was moved to the elevator. He was told he could use the elevator when the defendant was not using it, and that there was a man in the basement to run the elevator for him. He had no instruction how the elevator could be used. The fly-wheel was close to the elevator. He first moved the elevator down, and then up, and when it came up it went up with a jerk and touched the fly-wheel which fell on the boy. The manager of the defendant was in the basement, but witness did not have any conversation with the manager at such times. The em-

ployee of the defendant operated the elevator a few times on the day previous to the accident, as did the witness, but witness never moved the elevator with a load on it. On the morning of the accident, the witness did not call the employee of the defendant to operate the elevator, though the man was in the basement. The manager of the defendant had told the witness not to operate the elevator but to call the man on the floor. Does not know whether the manager of the defendant saw the boy. The parents of the boy knew the boy was working for witness.

The plaintiff here introduced expert testimony on the moving of heavy machinery. David Mottleson being recalled (R. 43) testified: "The edge of the fly-wheel protruded over the elevator shaft; the rising of the elevator platform struck the edge of the fly-wheel and turned it over. Another man and I were moving this fly-wheel; we brought it up in the elevator; it lay on its rounded edge; towards the center it protruded over the elevator shaft; one of the ends protruded over the shaft. The elevator was below and I pulled something and made it come up; it struck that and lifted it up, fell back and jumped up again."

At the close of plaintiff's case, the defendant moved for a nonsuit (R. 44) on the grounds: The evidence shows the boy was employed by Mottleson, and that Mottleson was an independent contractor; that the defendant was not required to oversee the servants of other employers; that a case has not been proven within section 3095 of the Revised Codes of Montana; that the defendant was not using the elevator at the time of the accident; that Mottleson in moving the

fly-wheel up, projected it into the shaft. The motion was denied.

The defendant, by the witness R. J. McDonald (R. 55) showed: He was present when Mottleson was told to get a Swift Company employee to run the elevator, and Mottleson thereafter called on one of the Swift men to operate the elevator. "The day before the accident, in moving up the first half of the fly-wheel, I flushed the elevator level with the floor by releasing the brake and turning the fly-wheel by hand, the fly-wheel on the elevator. Mr. Mottleson was present. In bringing it up that inch and a half or two inches I didn't use the motor of the elevator. It is hard to move the elevator that short distance with the motor, because the motor is so quick" (R. 57).

F. R. Jones, for defendant (R. 59). Came to Butte to install the new ice machine. After the new installation was completed, he sold the old ice machine to Mottleson who agreed to move it from the basement. The manager of the defendant told Mottleson that the defendant's servants would operate the elevator. Heard Mottleson request Swift employees to operate elevator for him. The witness left Butte the day before the accident. He had a contract with Swift to get the old machinery out. After the manager told Mottleson not to use the elevator, he went to his employees and told them to run it in case Mottleson asked.

W. J. Richards, for defendant (R. 63). Mr. Young, the manager of Swift, told Mottleson when he wanted to move the elevator to call one of the Swift boys.

Operated the elevator previous to the accident and immediately after, and it was in proper working condition. Had operated the elevator for Mottleson, but was not called on to operate it at the time of the accident.

Oscar Hedman, for defendant (R. 67). Dave Mottleson employed him. Was present when accident occurred; was at that time holding the fly-wheel. When Mottleson raised the elevator, the fly-wheel fell over. The edge of the fly-wheel was protruding over the elevator shaft.

The appeal is from the judgment. The questions raised are: 1. Does section 3095, Revised Codes of Montana of 1921, apply to this case? Before that section can apply to any case, does not the injured minor have to be in the service of the defendant in its plant and at one of the prohibited employments? 2. What is the proximate cause of the accident? Is is not the proximate cause the violation of section 3095 by Mottleson and Mottleson's negligent operation of the elevator and negligent placing of the fly-wheel where it could be struck? 3. The sufficiency of the evidence. 4. Was not Stewart Daly guilty of contributory negligence? 5. Parties in pari delicto.

SPECIFICATION OF ERRORS.

1.

The court erred in overruling the demurrer to the complaint (R. 13).

2.

The court erred in denying the motion for a nonsuit (R. 44).

3.

The court erred in holding that section 3095, Revised Codes of Montana of 1921, was applicable to the facts of this case.

4.

The court erred in holding that there was any evidence that the negligence of the defendant, if shown, was the proximate cause of the death of the decedent.

5.

Th negligence of David Mottleson, the employer of Stewart Daly, is the efficient, proximate cause of the injury to the decedent, not any negligence of the defendant—the negligence of Mottleson in operating the elevator and in placing the half portion of the flywheel where it could be struck by the elevator, and in employing the boy to work.

6.

The evidence shows that David Mottleson is the one guilty of negligence per se, in that he is the one who employed the boy to work, that he is the one who violated section 3095, R. C.

7.

The court erred in holding that the defendant, under section 3095, R. C., was guilty of negligence per se, in allowing the boy to be upon its premises though employed by another, an independent contractor.

8.

The evidence shows negligence on the part of the boy in putting himself in a position where he could be injured, he not assisting in moving the fly-wheel, which negligence is not explained away by the plaintiff.

9.

The evidence fails to show any notice or knowledge on the part of the defendant that the boy was working on the premises of the defendant.

10.

The court erred in denying the petition for a new trial (R. 24).

ARGUMENT.

The appellant feels that this appeal can be more clearly presented by discussing the specification of errors under the heads of the questions raised (set forth just preceding the specifications), the sufficiency of the evidence of necessity mingling with the other points.

1.

DOES THE COMPLAINT STATE A CAUSE OF ACTION UNDER SECTION 3095, REVISED CODES OF MONTANA OF 1921? DOES THIS SECTION APPLY TO THIS CASE? IS THE EVIDENCE SUFFICIENT TO SUSTAIN THE VERDICT AND JUDGMENT UNDER THIS SECTION? SHOULD NOT THE MOTION FOR A NONSUIT HAVE BEEN GRANTED? HAS NOT THE COURT IN ITS RULINGS MISCONSTRUED THIS SECTION?

Section 3095 is:

> Any person, company, firm, association, or corporation engaged in business in this state, or any agent, officer, foreman, or other employee having control or management of employees, or having the power to hire or discharge employees, who shall knowingly employ or permit to be employed any child under the age of sixteen years, to render or perform any service or labor, whether under contract of employment or otherwise, in, on, or about any mine, mill, smelter, workshop, factory, steam, electric, hydraulic, or compressed-air railroad, or passenger or freight elevator, or where any machinery is operated, or for any telegraph, telephone, or messenger company, or in any occupation not herein enumerated which is known to be dangerous or unhealthful, or which may be in any way detrimental to the morals of said child, shall be guilty of a misdemeanor and punishable as hereinafter provided.

The only Montana case dealing with this section is the case of *Burk v. Montana Power Company,* 79 Mont. 52, 255 Pac. 337, which does not reach the matter here. That case only deciding that the words "or in any occupation not herein enumerated which is known to be dangerous or unhealthful, or which may

be in any manner detrimental to the morals of said child" are void.

The trial court placed too broad a construction on section 3095. First: The court did not limit the meaning of the section to the proposition that the minor must be in the employ of the defendant Swift. Second: The defendant has and had no control over the servants of Mottleson, no power to hire or discharge them, no right to control them. Third: "Permit to be employed" means employed by Swift, or in the service of Swift. Fourth: "In, on or about * * * freight elevator" means employed "in or on," as an elevator boy; "about," as doing work directly connected with the elevator, such as repairs, and not merely riding upon or using it, when operated by another, as a means for doing his work. Fifth: Knowledge by Swift of the employment is necessary.

The phrase "having control or management of employees, or having the power to hire or discharge employees" applies to "any person, company," etc., as well as to "any agent, officer," etc. That is, the company must have the right to hire and discharge, or the company's officer must have that right, before the case falls within the statute. The sense of the section is that the minor must be in the employment of the company which owns or runs the factory, mill, smelter or elevator, and not there casually as the servant of and in the employment of a third person. If this is not true, then a railroad must oversee all persons who go to its freight depot to haul away freight; every boy on delivery wagons or transfer wagons of grocery houses, which employment is not banned by the stat-

ute, must be questioned before he can take an article from the railroad. The result of this is that one man must be and is the guardian and overseer of another man's servants.

The minor must be directly in the employment of the factory before the statute can apply, and not in the employment of an independent contractor of a third person who has business or work at the factory. The only case we have been able to find directly on this point is that of *Rugart v. Keebler-Weyl Baking Co.*, 121 Atl. 198; 277 Penn. 408, where it is said:

> The act of 1905 (P. L. 352) is inapplicable to the facts of this case. It is an act to regulate employment by regulating the age at which minors may be employed, and the safety and health of employees. The purpose is to safeguard employees in the factories or buildings of their employers; it does not extend to the premises of others where those who might engage the employer to work. Such persons do not incur liability under the act as employers of minors, where the employer brings onto the premises a minor unlawfully employed, who may later be injured. To subject to liability within the terms of the act, the relation of master and servant must exist, or a situation tantamount thereto; otherwise the common-law rules applicable to torts govern injuries of this character.
>
> This defendant owed no statutory duty to the boy plaintiff to guard its shafting, to instruct him as to the dangers incident to his work, or to offer him a reasonably safe place in which to work. These were obligations of the employer, whose duty it was to provide a safe place and to instruct

> the employee in the dangers incident to his work, as well as to observe the statutory duty of employment.

It is also said in the case of *Brilliant Coal Co. v. Sparks,* 81 So. 185; 16 Ala. App. 665:

> The complaint in the instant case fails to specifically allege that the defendant retained supervision and control of the mine to such an extent that it could have prevented the employment of plaintiff. If this were so the defendant could not be held liable for the injury.

Some meaning must be given to the phrase "having control or management of employees, or having the power to hire or discharge employees." And that meaning can only be that the minor must be the servant of the factory owner. In this case the complaint fails to allege facts, and the evidence fails in facts, showing that the defendant had control or management of Stewart Daly, or had the power to hire or discharge him. The evidence shows the directly opposite facts.

The cases which are relied upon by the plaintiff all show that the injured minor was more or less in the employment of the factory owner.

Section 3095 also provides "who shall knowingly employ or permit to be employed," and in this respect differs from the statutes of some states. Knowingly here means that the factory owner must have knowledge of the unlawful employment of a minor. In the case of a corporation, such knowledge must be brought home to the managing head, or to a person or board

who or which has the authority and power to correct the employment. The evidence does not show that the defendant or any of its managers or officers or responsible head knew Stewart Daly was employed by Mottleson to work at the plant (and Daly was so employed because it is admitted by the plaintiff). Knowledge of wrongful employment coming to a day laborer or to one who has no directing power is not knowledge of the corporation. The fact that Daly was there and was seen by certain servants of the defendant picking up bolts and carrying tools does not show knowledge in the defendant of employment.

People v. Taylor, 85 N. E. 759; 192 N. Y. 398;
Clover Creamery Co. v. Kanode, 129 S. E. 222; 142 Va. 542.

2.

PROXIMATE CAUSE.

Suppose that Stewart Daly was, contrary to the statute, allowed by the defendant to work at its plant. Then, is such act of the defendant the proximate cause of the injury? Is not the proximate, inducing cause the wrongful employment of the boy by Mottleson, and the negligent operation of the elevator by Mottleson (a person not connected with the defendant), aided by the negligent placing of the fly-wheel in a position where it could be struck by the elevator? Here the acts of Mottleson intervened, and the boy would not have been injured but for Mottleson's wrongful and negligent acts.

This is illustrated in the case of *Aymond v. Western Union Telegraph Co.*, 91 So. 671; 151 La. 184, where a boy was employed contrary to the statute as a messenger by the telegraph company. In the course of his employment he was required to cross railroad tracks, and in doing so was killed by reason of the negligence of the railroad. The court said:

> The defense is that this defendant acted in good faith, upon representation made by the boy that he was more than 16 years old, and appeared to be so; and that in any event this employment was not the proximate cause of his death.
>
> It may be that the good faith of the defendant is no excuse in such matters * * *; but we find it unnecessary so to hold in this case. For we find here, as shown above, that between the alleged negligence of this defendant and the injury suffered by the boy, there supervened the culpable act of a third party for whom the defendant was not responsible, and hence the defendant's alleged negligence was not the proximate cause of the injury.
>
> We find it unnecessary to decide, and we do not decide in this case, whether the defendant would or would not be liable had the supervening act of the third person been nonculpable. That is left absolutely open. We mean here to decide only this: that since between the alleged negligence of this defendant and the alleged consequence thereof there did supervene the culpable act of a third person for whom the defendant was not liable, then it follows that the act of the other party, and not the alleged negligence of this defendant, was the proximate cause of the injury.

> "The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury and without which the injury would not have occurred."
>
> *McCloskey v. Butte,* 78 Mont. 180; 253 Pac. 267.

Mottleson violated the statute, section 3095, when he employed Stewart Daly to work at an employment banned by the statute, assuming that the employment in this case was prohibited. This started going a course of events which finally resulted in the death of the boy. Then after this violation of the statute by Mottleson, Mottleson negligently placed the fly-wheel in a position so that it projected into the elevator shaft where it could be struck by the elevator when in motion. And then, Mottleson contrary to the orders of the defendant operated the elevator, and negligently operated it so that it struck the fly-wheel which fell upon the foot of Daly. Mottleson had been expressly forbidden to operate the elevator (R. 36, 52, 60, 63). When the fly-wheel had been moved to the elevator for loading, the elevator was below the floor level (R. 33), and the fly-wheel projected into the elevator shaft (R. 33, 67). It was shown (R. 57, 64-65) how to properly bring the floor of the elevator to a level with the floor of the basement, and that it required an expert to do it.

Hence, we must conclude that the injury was not the direct result of the work itself, but of the manner in which the work was done, the manner of its performance by the person who contracted to do it, the person who owned the machinery at the time.

It is said in *Laffery v. U. S. Gypsum Co.,* 111 Pac. 498; 83 Kan. 349:

> It is clear from the cases cited and many others in which the subject has been considered that the intrinsic danger of the undertaking upon which the exception is based is a danger which inheres in the performance of the contract, resulting directly from the work to be done, and not from the collateral negligence of the contractor.

Though the work which the owner of a building has contracted, with an independent contractor, to be done is of itself so inherently dangerous that the owner cannot shift responsibility for an injury, yet there is the exception which excuses the owner when the contractor employs negligent methods, or the manner of performance by the contractor is so negligent that an injury occurs.

Thus, in *Dayton v. Free,* 148 Pac. 408; 46 Utah 277:

> The injury here was not the direct result of the stipulated work but from the manner of doing it—from the failure or negligence of some one to warn the plaintiff of the missed hole or to establish and promulgate rules giving notice of such fact. Nor was the injury caused by the nonperformance of a duty owing by the company to the plaintiff. He was directly employed by Free & Taylor, or Stewart et al., and not by the company. Nor was he subject to its direction or control. And, as has been seen, it having neither reserved nor exercised direction or control over the work, or the time or manner of doing it, it owed him no duty to provide a safe place to work, or to warn or notify him of missed holes, or to

guard him against dangers incident to or created by the prosecution of the work, and certainly not to guard or protect him against the negligence of those who had employed him or with whom he labored.

Also, *Smith v. Naushon,* 60 Atl. 242; 26 R. I. 578:

The plaintiff alleges that he was an employee of the defendant, engaged in running a loom in defendant's mill; that while the loom was still, and the plaintiff was engaged in adjusting the yarn upon it, the servant of an independent contractor, who was setting up water pipes for a fire extinguisher system in the same room, having occasion to use a stepladder, negligently struck the ladder against the belt shipper attached to the loom, in consequence of which it started, and injured the plaintiff, * * * but the sole proximate cause of the accident was the carelessness or negligence of the agent of the contractor. It was an "independent act of a responsible person," and one which the defendant had no reasonable ground to apprehend would occur from permitting him to work there.

Also, *Schmidlin v. Alta Planing Mill Co.,* 150 Pac. 983; 170 Cal. 589:

Appellant recognizes the general rule that exonerates the employer of an independent contractor and fixes the responsibility upon the contractor himself, but insists that his case comes under the exception to the rule which exception sustains an action against the employer under the doctrine of respondeat superior, where the performance of the contract in its general nature is necessarily injurious to a third person, or where,

under grant or permission to do a specific work in a careful manner, which otherwise one could not lawfully do at all, the employer is not permitted to avoid the consequences of the negligent performance by his contractor of the duty primarily imposed upon him—the employer. * * * The other class of cases is that where danger and peril inhere in the very nature of the work, and where, therefore, it is not in consonance with justice that the responsibility for injury resulting from or occasioned by this peril should be passed on to the contractor. But appellant's effort to bring this case within that category is manifestly futile. There is nothing inherently dangerous in the character of the work here to be done, and, if it should even be conceded that it were, it is plain that it was no hazard or peril inhering in the nature of the work that caused the accident. It was the merest negligence—negligence almost gross in character—the hauling up of a bucket of paint, the bucket itself not even being fastened, upon an empty scaffold carrying no person to direct and guide it, and no person to look out for the bucket of paint. Such conduct in its nature is too plain to call for further consideration, and may be dismissed with the single comment that manifestly this negligent act formed no attribute, part, or characteristic of the work itself. * * * The place where plaintiff was at work when injured was not in and of itself unsafe; it was not unsafe even because the employees of an independent contractor were painting or were about to paint signs on the wall above him. It was rendered unsafe solely by the negligence of the painters in the performance of their task.

Also, *Nickey v. Steuder,* 73 N. E. 117; 164 Ind. 189:

This action was brought by appellee to recover damages for injuries sustained by him while in the employ of appellants Nickey, Nickey & Nickey, who owned and operated a sawmill in which "saw logs, trees, and timber were manufactured into dimension stuff." The slabs were sawed into stove wood in the mill, and carried by a carrier a distance of 50 feet or more from said mill, and thrown upon the ground. Appellee at the time of his injury was engaged in throwing said stove wood back from where it was deposited by the carrier. Appellant Wessel, who had purchased some of said stove wood, entered upon the mill premises with a wagon for the purpose of hauling the same away, and while engaged in loading said stove wood threw a stick thereof against appellee and injured him. At the time appellee was injured he was under the age of 14 years. * * * The right to recover against the Nickeys is based on sections 7087b, 7087y, Burns' Ann. St. 1901; the first of which provides that "no child shall be employed in any manufacturing or mercantile establishment, mine, quarry, laundry, renovating works, bakery or printing office within this state." * * * The employment by Nickey, Nickey & Nickey of a person under the age of 14 years, in their sawmill, was a violation of said sections 7087b and 7087y, supra, and was negligence per se, and they were liable to such person for any injury of which that was the proximate cause, provided the injured party was not guilty of contributory negligence. * * * In such a case the employer will not be liable merely because his act constituted a violation of law, but only if it proximately caused the injury com-

plained of. Although the violation of such a statute is negligence per se, there must be a causal connection between the unlawful act and the injury, which must be shown in the pleading and by the proof or the action fails. Such causal connection is interrupted by the interposition between the negligence and the injury of an independent, responsible human agency. * * *

Tested by this rule, the negligence of appellants Nickey, Nickey & Nickey in employing appellee in the sawmill was not the proximate cause of his injury, for, under the authorities cited, it cannot be said that appellants, in the exercise of ordinary care, ought to have anticipated or foreseen as the natural or probable result of such employment that appellee would be injured by an independent, responsible human agency. It is alleged that "Wessel negligently and carelessly threw a stick of wood or timber weighing about eight pounds against plaintiff thereby injuring him." The intervening agency was an independent human agency, direct and positive in its nature and effect, and certainly, under the rule stated, the injury to appellee cannot be attributed to the negligence of the Nickeys in employing him in their mill. The court erred, therefore, in overruling the demurrer of Nickey, Nickey & Nickey.

Colen v. Gladding etc. Co., 136 Pac. 289; 166 Cal. 354;

Missouri Valley etc. Co. v. Ballard, 116 S. W. 93; 53 Tex. App. 110.

Grant that a violation of section 3095 is negligence per se, yet a violation does not prove liability. The mere violation of the statute is not sufficient to fasten

liability upon a defendant. It is said in *Stroud v. Chicago, Milwaukee & St. Paul Ry. Co.*, 75 Mont. 384; 243 Pac. 1089:

> Failure of the defendant to comply with the statute requiring the blowing of the whistle and sounding of the bell on approaching the crossing was negligence per se. * * * But the mere fact that defendant was proven negligent did not establish plaintiffs' right to recover. They were required to go further and show that the defendant's alleged negligence was the proximate cause of the injuries which they received.

Monson v. La France Copper Co., 39 Mont. 50; 101 Pac. 243;

Barrett v. U. S. R. R. Adm., 196 Iowa 1143; 194 N. W. 222;

Hickey v. Missouri Pac. R. R., 8 Fed. (2d) 128.

We submit that the negligent and unauthorized acts of Mottleson cut between any alleged violation of the state by the defendant and the injury to Stewart Daly, and that such acts of Mottleson were the proximate causes of the injury.

NEGLIGENCE OF STEWART DALY.

The evidence shows without contradiction that all Stewart Daly did was the picking up of bolts and the carrying of tools. He had no part in the moving of the fly-wheel (R. 31). The case of the plaintiff presents evidence which makes out prima facie contributory negligence on the part of the boy. He having nothing to do with the moving of the machinery,

should not have put himself where he could have been hurt by it. Assuming the plaintiff's contention that the method of moving the fly-wheel was dangerous, then the boy was in a known place of danger, where his duties did not call him and when he was of an age to appreciate the danger. This evidence is unexplained by the plaintiff. This case is clearly within the doctrine of many Montana cases, which is:

> Whenever, however, the plaintiff's own case presents evidence which unexplained, makes out prima facie contributory negligence upon his part, there must be further evidence exculpating him or he cannot recover.
>
> *Grant v. Chicago, Milwaukee & St. Paul Ry. Co.,* 78 Mont. 97; 252 Pac. 382, and cases cited.

PARTIES IN PARI DELICTO.

In the State of Montana any right of action the minor had, prior to his death, for injuries survives and is to be maintained by his administrator.

> *Melzner v. Northern Pacific Ry. Co.,* 46 Mont. 162; 127 Pac. 146.

Such action is solely for the benefit of his heirs, and the proceeds of the action cannot be considered any part of his estate.

> *Batchoff v. Butte Pacific Copper Co.,* 60 Mont. 179; 198 Pac. 132.

Section 7073, subsection 2, provides:

> "If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and

mother in equal shares, or if either be dead then to the other."

The father and mother of Stewart Daly are his heirs.

The father and mother are violators of the law under which they seek, through the administratrix, to hold the defendant liable. Section 3096, Revised Codes of Montana of 1921, says that

> "Any parent * * * who shall permit, suffer or allow any such child to work or perform service for any person, * * * or who shall permit or allow any such child * * * to retain such employment as is prohibited in the preceding section * * * shall be guilty," * * *.

Stewart Daly was under the care, custody and control of his parents.

> "The father and mother of a legitimate unmarried minor are equally entitled to its custody, services and earnings."
>
> Section 5834, Revised Codes of 1921.

The parents owed the duty to keep the child out of danger. (*Harrington v. Butte, Anaconda & Pacific Ry. Co.,* 37 Mont. 169; 95 Pac. 8.) The parents cannot be allowed to say they did not know where the child was. They were in a position to know. They knew, however, he was working for Mottleson (R. 38, 39), and knew that Mottleson was in the junk business (R. 38, 40). Being in a position to know where the boy was working it was their duty to find out, and what they could have found out they are presumed

to know. It was their duty to see that he was in no place prohibited by statute.

"Permit" in the two sections, 3095 and 3096, must have the same meaning. The parents should not fasten liability on the defendant by one meaning and excuse themselves by another meaning. If the defendant is in the wrong, the parents are in the wrong; they are in pari delicto, and when in such position the courts will leave them there.

Melville v. Butte-Balaklava C. Co., 47 Mont. 1; 130 Pac. 441;

Jackson v. Lomas, 60 Mont. 8; 198 Pac. 434;

Kallio v. Northwestern Imp. Co., 47 Mont. 314; 132 Pac. 419.

In the *Jackson* case, above, the court says:

> It is the general rule that the violation of a penal statute or ordinance by one resulting in injury to another is negligence per se. * * * But this rule fails of application where the parties are in pari delicto.

It is respectfully submitted that the judgment should be set aside and the action dismissed.

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